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In the Supreme Court of the United States

OCTOBER TERM, 1981

TOM WELCH,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

DOES THE WORD "THROUGH" AS USED IN 18 U.S.C.A. 1962 REQUIRE THAT AN ENTERPRISE BE FURTHERED OR ADVANCED BY THE PATTERN OF RACKETEERING ACTIVITIES AS REQUIRED BY THE FOURTH AND SEVENTH CIRCUIT COURTS OF APPEAL OR IS IT SUFFICIENT FOR THE PROSECUTION TO MERELY SHOW A RELATION BETWEEN THE PREDICATE OFFENSES AND THE AFFAIRS OF THE ENTERPRISE?

LIST OF ALL PARTIES TO THIS PROCEEDING

Tom Welch is the Petitioner in the Petition for Writ of Certiorari. Co-Defendants Charles Cashell, William L. Satterwhite, and James M. Cochran are parties who are represented by different Attorneys and are likewise filing petitions for writ of certiorari arising out of the same conviction as that of Petitioner, Tom Welch.

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OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at _____ F.2d _____, United States of America vs. Tom Welch, et al (5th Cir. September 21, 1981) a copy of the lower Court's opinion is in the appendix of Petitioner, William L. Satterwhite whose Petition for Writ of Certiorari is likewise pending with this Court.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit denying petitioner's Motion for Rehearing was entered on November 2, 1981 and this Petition for Certiorari was filed within sixty (60) days from such date. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

THE DATE OF THE JUDGMENT SOUGHT TO BE REVIEWED

The Court of Appeals for the Fifth Circuit denied Petitioner's Motion for a Rehearing on November 2, 1981.

STATEMENT OF THE CASE

On August 3, 1979, a federal grand jury sitting in Tyler, Texas returned a six-count indictment against twelve individual defendants. Count I of the indictment alleged that six defendants (none of whom are involved in this appeal) conducted, financed, managed, supervised, directed, or owned an illegal gambling business in violation of 18 U.S.C.A. Section 1955. Count II charged the same defendants with a conspiracy to violate section 1955 in violation of 18 U.S.C.A. Section 371. Prior to trial, Counts I and II were severed from the remaining counts and certain parties were severed from Counts I and II. These counts are not before this Court on appeal.

In Count III of the indictment, defendants Tom Welch, Raymond L. Cantrell, William L. Satterwhite, and James M. Cochran were charged with conspiracy to obstruct the enforcement of the criminal laws of the State of Texas with the intent to facilitate and illegal gambling business in violation of 18 U.S.C.A. 1511. This conspiracy, which involved the facilitation of Cantrell's game was alleged to have existed from January 1, 1973 to January 17, 1979. Raymond Cantrell was severed from the indictment prior to trial.

Count IV of the indictment charged Tom Welch,

Billy Eugene Bryan, Billy Ray Roach, and Charles Cashell (along with several unindicted co-conspirators) with a second conspiracy to obstruct the enforcement of the criminal laws of the State of Texas with the intent to facilitate an illegal gambling business in violation of 18 U.S.C.A. Section 1511. Billy Bryan was severed from the indictment before the trial. Billy Roach died during the pendency of this appeal.

The indictment charged that this conspiracy, involving the gambling at the fairgrounds, took place in September 1978. Count V alleged that from January 1, 1973 to January 17, 1979, Sheriff Tom Welch, Deputy Sheriffs James M. Cochran and Billy Ray Roach, County Commissioner William L. Satterwhite, and Justice of the Peace Charles Cashell conducted and participated in the conduct of the affairs of an enterprise - the Sheriff's Office of Gregg County, Texas - through a pattern of racketeering activity in violation of 18 U.S.C.A. Section 1962(c).

With respect to Count V, Cochran was charged with three specific acts of racketeering: Conspiracy to obstruct the enforcement of the criminal laws of the State of Texas with intent to facilitate an illegal gambling business (act A), conspiracy to murder (act G), and accepting a pecuniary benefit($300) to exercise

discretion as a public servant to allow the club at the Patriot Motel to operate in an unlawful manner (act R.)

Satterwhite was charged with two specific acts of racketeering under Count V: Acts A (the Count III conspiracy involving Cantrell's game) and G (the conspiracy to murder charge).

Welch was charged with fourteen specific acts of racketeering under Count V: Act A (the Count III conspiracy involving Cantrell's game), conspiracy to obstruct the enforcement of the laws of the State of Texas with intent to facilitate an illegal gambling business (act B). (This is the same as Count IV and involved the gambling at the fairgrounds); two counts of accepting apecuniary benefit from Seymour Schlar to allow illegal gambling in the midway at the Country Fair (acts C and D), solicitation of and c;onspiracy to murder (act G), seven counts of accepting pecuniary benefits (labor) from prisoners for exercising discretion as a public official (acts H through N), (Paragraphs H and I allege that Welch accepted labor from certain individuals confined in the Gregg County Jail as consideration for exercising his discretion as sheriff and not transporting these people to the penitentiary at the Texas Department of Corrections pursuant to a lawful order. Paragraphs J, K, L, M,

and N allege that Welch accepted labor from certain individuals confined in the jail as consideration for exercising his discretion and granting individuals special privileges during their confinement); accepting a pecuniary benefit in return for not arresting or apprehending a person pursuant to a lawful order (act O), and accepting a pecuniary benefit ($100) to allow the club at the Patriot Motel to operate in an unlawful manner (act Q). The act alleged in paragraph O of the indictment was severed after the start of the trial.

Finally, under Count V, Cashell was charged with three specific acts of racketeering: Act B (the conspiracy count involving the fairgrounds gambling), accepting a pecuniary benefit ($350) from Seymour Schlar to allow illegal gambling on the midway at the County Fair (act E), and obtaining driver's license information through the Sheriff's Office in return for a pecuniary benefit (act P).

The last count in the indictment, Count VI, charged Welch with a violation of the civil rights of a prisoner while incarcerated in violation of 18 U.S.C.A. Section 242. The charge was based upon an alleged incident when Sheriff Welch beat an unresisting prisoner with the barrel of his pistol. This count was severed from the indictment on the second day of trial

on the basis of misjoinder. The count was later dismissed in its entirety.

After a thirteen day trial, the jury returned a general verdict of guilty on Counts III, IV, and V against all defendants. Welch was sentenced to serve two consecutive five-year terms on Counts III and IV. With respect to his conviction on Count V, Welch was sentenced to serve ten years, the sentence to run concurrently with the sentences imposed for Counts III and IV. For their convictions on Counts III and IV, Satterwhite and Cochran were sentenced to two concurrent five-year terms. Cashell was sentenced to two concurrent three-year terms for this Count IV and V convictions.

REASON FOR GRANTING THE WRIT

QUESTION PRESENTED FOR REVIEW RESTATED: DOES THE WORD "THROUGH" AS USED IN 18 U.S.C.A. 1962 REQUIRE THAT THE AFFAIRS OF AN ENTERPRISE BE FURTHERED OR ADVANCED BY A PATTERN OF RACKETEERING ACTIVITIES AS REQUIRED BY THE FOURTH AND SEVENTH CIRCUIT COURTS OF APPEAL OR IS IT SUFFICIENT FOR THE PROSECUTION TO MERELY SHOW A

RELATION BETWEEN THE RACKETEERING ACTIVITIES AND THE AFFAIRS OF THE ENTERPRISE?

In this case the Government charged the Gregg County, Texas Sheriff's Office as an enterprise. Its members, however, were comprised of the Sheriff, two Deputies, a Justice of the Peace, and a County Commissioner.

Evidence was offered to show that each Defendant participated in the various acts of racketeering charged, but no evidence was offered to show that this activity in any way furthered or advanced the interest of the Sheriff's Office. The Gregg County Sheriff's Office is a county office mandated by the Texas Constitution. It operates with dozens of employees in scores of legitimate areas such as the service of process, patrol, conducting criminal and civil investigations, acting as courtroom bailiffs, maintenance of jail facilities, transportation of prisoners, and the like in a county with the population of over 100,000.

No evidence was offered to show in any manner that this consitutionally mandated office benefited or had its objective furthered by the racketeering ac-

tivities allegedly committed by the individual defendants.

Petitioner Welch contends that the prosecution failed to show that the activities of the Sheriff's Office were conducted "through" the alleged acts of racketeering. By the use of the word "through", Petitioner argues that the racketeering activities must have benefited or advanced the Sheriff's Office enterprise.

The trial court declined to instruct the jury that such promotion or advancement was necessary to a RICO conviction. The lower court in its slip opinion at page 11435 holds that the prosecution need only show a relation between the predicate offenses and the affairs of the enterprise to prove that the enterprise's affairs were operated through a pattern of racketeering.

At least two Circuits conflict with the Fifth Circuit Court of Appeals on the use of the word "through" as used in 18 U.S.C.A. 1962, the RICO statute. The Seventh court in United States v. Nerone 563 F.2d 836 (7th Cir. 1977) and the Fourth Circuit in United States v. Webster 639 F.2d 174 (4th Cir. 1981) require proof that the racketeering activities charged as predicate offenses must advance or further the enterprise charged. In addition, the lower court's con-

struction of the word "through" conflicts with its own decision in *United States v. Elliot* 571 F.2d 880 (5th Cir. 1978.)

In the *United States v. Webster* 639 F.2d 174 (4th Cir. 1981) the enterprise alleged in the indictment was the 1508 Club Tavern and Liquor Store. The Court reversed the RICO conviction saying that the Club's affairs were not promoted by the racketeering activities; the affairs of the drug dealing individuals who used the club as a base, however, were promoted.

The Court noted that conducting the enterprise through racketeering is plainly not the same as conducting the racketeering through the enterprise, and held as follows:

> "A reading of the statutory language -"to conduct such enterprises affairs through a pattern of racketeering activity" - supports our view, that is it is the enterprises affairs which must be advanced by racketeering. The meaning of the word "through" suggests that, at least where the Government elects to cast a section 1962(c) indictment in a form in which the "enterprise" is the legal or obstensibly legal activity, and not the racketeering activity itself, the statute should be applied in such a way as to punish where the racketeering activity advances the non-racketeering business, but not

> where the only relation between the two consists of benefits which the racketeering activity derives from the non-racketeering enterprise."

Maple Manor, Inc., which operated a mobile home park, was charged with being a RICO enterprise in *United States v. Nerone* 563 F.2d 836 (7th Cir. 1977). In that case a casino was operated on the premises, but neither the casino nor its operators were charged with being an enterprise. The Court indicated that the affairs of the mobile home park and the casino operation may well have had their affairs conducted through a pattern of racketeering activities but not the corporation Maple Manor, Inc. The Court further noted that the congressional use of the word "through" in 1962(c) was not intended to be meaningless. Instead, they ascribed the most logical definition to that word as used in the statute and that is, "by means of, in consequence of, by reason of." See Blacks Law Dictionary. Therefore, if the word "through" is to have operative meaning, the Government must offer some proof that the affairs of the enterprise were conducted through a pattern of racketeering activity or through the collect of unlawful debt. The Court noted that the Government failed in proving the affairs of Maple Manor, Inc. were so conducted, and consequently reversed the RICO conviction against the Defendants.

The lower Court's holding in the instant case that it was not necessary for the Government to show the affairs of the enterprise were advanced by the predicate offenses is in conflict with its own decisions in the oft-cited case of the *United States v. Elliott* 571 F.2d 880 (5th Cir. 1978). Among other issues, the defendants' first contention was that their criminal activities were isolated, and were not committed in furtherance of the enterprise which consisted of six individuals. The Court rejected the contention and specifically showed in its opinion how the racketeering acts did further and advance the enterprise.(See pages 902-905). The Court specifically referred to the requirement that the criminal activities advanced the enterprise in the following passages:

> "Under the statute, it is irrevelant that such defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprises affairs" id. 902-903

> "Where, as here, the evidence establishes that each defendant, over a period of years, committed several acts of racketeering activity in furtherance of the enterprise's affairs, the inference of and agreement to do so is unmistakable." id. 903

> "In the instant case, it is clear that the

> essential motive of the plan was to associate for the purpose of making money from repeated criminal activity." id. 904.

The *Elliot* Court in reversing a RICO conviction against the Defendant Elliot noted "the Government failed to prove that Elliot's amphetamine transactions with Fuchs were in any way connected with the affairs of the enterprise". id. 908.

Assuming Defendant Welch was guilty of each racketeering activity charged, how was this conduct connected with the enterprise or how did it further the County office of Sheriff?

Consistent with congressional purposes of RICO, the enterprise must be furthered or advanced by racketeering activities otherwise it could not ". . . annually drain billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption". Pub.L.NO. 91-452 Section 1, 84 Stat. 922, statement of findings and purposes of the origanized crime control act of 1970.

If the enterprise concept is to be used to supplement the deficiencies in the law of conspiracy, then it, like the offense of conspiracy must have an objective to accomplish. The essence of a conspiracy is the

agreement to commit an unlawful act. Why then would not the enterprise have an objective to accomplish similar to the conspiracy, and to set about accomplishing that objective within the enterprise.

It is likely the prosecution selected the Sheriff's Office as an enterprise simply because the Sheriff was its target. Simply naming his office as the enterprise would greatly lessen the interstate commerce aspect required by 18 U.S.C.A. 1962.

Essentially, both gambling games charged in Counts III and IV were local and did not have an effect on interstate commerce. The Government in its proof concedes as much. However, by naming the Gregg County Sheriff's Office as the enterprise, the prosecution easily satisfied the interstate commerce aspect required by the RICO statute.

What if the prosecution should be investigating an officer of a bank who along with insiders and outsiders participated in a RICO offense, the profits of which never inured to the bank's benefit. Could the prosecution name the bank as an enterprise merely because the racketeering activities engaged in by the participants related to the affairs of the bank in some remote manner?

Zealous prosecutors could carry this example to the very extreme thus necessitating this Court to eventually agree with Appellant's contention, and what must have been congressional intent that the enterprise affairs must somehow be advanced through the pattern of racketeering activities charged.

In the instant case, the Grand Jury simply named the wrong enterprise; instead of the Sheriff's Office it should have named the individuals. However, Petitioner contends that the Sheriff's Office was named as an enterprise to unfairly maximize the multitude of prejudicial acts charged against him in the indictment under the guise of being racketeering activities. Even the lower court grudgingly admitted that many of the racketeering activities charged against Petitioner Welch probably amounted to misdemeanor charges when viewed under the governing State statute. (See slip opinion pages 11430-11431).

The lower Court's broad interpretation of the word "through"gives the prosecution a license to charge virtually any misdeed as a pattern of racketeering activity. Instead, use of the RICO statute should be limited to defined groups working toward a common objective because it so liberalizes the rules of evidence to permit inclusion of evidence

about every conceivable misdeed committed by each member of the group. This is especially harmful to the rights of joint defendants when the jury has no need to find any cohesive purpose of existence between the individual defendants.

Petitioner's contention is further supported by the dissenting opinion of Judge Cudahy of the Seventh Circuit in *United States v. Lee Stoller Enterprises, Inc.* 652 F.2d 1313 (7th Cir. 1981).

CONCLUSION

For the reasons urged herein, it is respectfully requested that a Writ of Certiorari issue to review and reverse the judgment of the Court of Appeals for the Fifth Circuit entered herein.

DATED this 12th day of January, 1982.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 12th day of January, 1982, true and correct copies of the foregoing Petition for Writ of Certiorari were mailed to the United States Attorney for the Eastern District of Texas, P. O. Box 1049, Tyler, Texas 75710; Charles Clark, 1016 First Place, Tyler, Texas 75702 Attorney for William Satterwhite; Laughton Whitehead, P. O. Box 688, Longview, Texas 75601, Attorney for Charles Cashell; and Lynn Patton, P. O. Box 511, Longview, Texas 7501, Attorney for James Cochran.

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